

BORA LASKIN LAW LIBRARY



3 1761 10637565 2



UNIVERSITY OF TORONTO  
FACULTY OF LAW

## FAMILY LAW

### Cases and Materials

### Volume I

Brenda Cossman  
Faculty of Law  
University of Toronto

2021-2022

BORA LASKIN LAW LIBRARY

SEP 30 2021

FACULTY OF LAW  
UNIVERSITY OF TORONTO

*These materials are distributed solely for classroom use  
by students in the Faculty of Law, University of Toronto*

KE  
538.5  
.C372  
2021/22

v.1  
c.1





# **FAMILY LAW**

## **Cases and Materials**

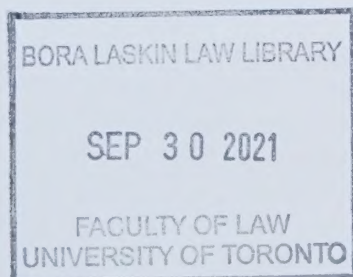
### **Volume I**

**Brenda Cossman  
Faculty of Law  
University of Toronto**

**2021-2022**

\* \* \*

*These materials are distributed solely for classroom use  
by students in the Faculty of Law, University of Toronto*





**FAMILY LAW**  
**TABLE OF CONTENTS**  
**Volume I**

**I. INTRODUCTION: THE FAMILY AND FAMILY LAW**

**A. The Family: Definitions and Demographics**

Margrit Eichler, "Beyond the Monolithic Bias in Family Literature," <i>Families in Canada Today</i> (Toronto: Gage, 1983) at 3 .....	2
Vanier Institute of the Family, "Definitions of Family," <i>Profiling Canada's Families</i> (1994) at 10-11 .....	4
Note: Statistics Canada's Definitions of the Family .....	5
Vanier Institute of the Family, <i>Profiling Canada's Families IV</i> (2010) at xi-xiii, .....	6
Bruce Campion-Smith, "Canada has more same-sex couples, one-person families, census Shows", Toronto Star, August 2, 2017 .....	8
Vanier Institute of the Family, "Facts and Stats: Indigenous Families in Canada" June 20, 2017 .....	11
Pamela Cross, "Why do so few Indigenous Women engage with the family law system?" January 23, 2020 .....	12
FTP Ad Hoc Working Group on Family Violence, "Making the Links in Family Violence Cases" (Justice Canada, 2013) at 3-5 (vol 1) and 5-15 (vol 2) .....	14

**B. Legal Regulation of the Family**

**(a) The Evolution of Western Family Law**

John Eckelaar, <i>Family Law and Social Policy</i> , 2d ed (London: Weidenfeld and Nicolson, 1984) at 15-26 .....	19
John Dewar, "Regulating Families" in Parker et al, <i>Regulating Law</i> (Oxford: Oxford University Press, 2004) .....	22

**(b) Federalism/Jurisdiction**

Peter Hogg, <i>Constitutional Law of Canada</i> (1985) at 533-534 .....	27
<i>Constitution Act</i> , Section 35: Rights of the Aboriginal Peoples of Canada .....	27
<i>Beaver v Hill</i> , 2019 ONCA 520 .....	28

**(c) Processes**

Amanda Jerome, "Ontario Unified Family Court proposal calls for province-wide expansion by 2025" <i>The Lawyer's Daily</i> (September 25, 2017) .....	29
John-Paul Boyd, "Collaborative Settlement", <i>Vanier Institute of the Family</i> (Vol. 45, No. 3) .....	30

**(d) The Crisis of Access to Justice**

Final Report of the Family Justice Working Group: "Meaningful Change for Family Justice: Beyond Wise Words" (April 2013) at 1-2, 5-9, 11-20 .....	34
---	----

**II. MARRIAGE AND NULLITY**

**A. The Significance of Marriage**

**(a) Demographics of Marriage and Other Intimate Relationships**

Anne Milan, <i>Marital Status: Overview 2011</i> (Statistics Canada, July 2013) at 1-11 .....	41
Statistics Canada, <i>Being Married or Common-Law in Canada</i> (2017) .....	44
Statistics Canada, <i>Portrait of Families and Living Arrangements in Canada</i> (Sept. 2012) at 7-10, 13-14 [extract couples with children and children's living arrangements] .....	45
Statistics Canada, "Census in Brief: Same-sex Couples in Canada in 2016" (Aug. 2, 2017) .....	47
Nathan Battams, "Living Together Apart" Vanier Institute of the Family, <i>Fascinating Families</i> (Issue 60, Dec. 2013) at 1 .....	49
Statistics Canada, <i>Couples Who Live Apart</i> (2017) .....	51



## B. Validity of Marriage

### (a) Overview

Sir William Blackstone, <i>Commentaries on the Laws of England</i> (1765) .....	52
<i>Hyde v Hyde</i> (1886), 1 LR (P & D) 130 .....	52
H R Hahlo, <i>Nullity of Marriage in Canada</i> (1979) at 1-5.....	52
Berend Hovius and Mary-Jo Maur, Note on Validity of Marriage .....	53
Canada 150: A century and a half of marriage.....	54
Russell Alexander, “Why Bother with a Marriage Annulment Instead of Divorce?” .....	60

### (b) Formal Validity: The Ceremonial Requirements for a Valid Marriage

<i>Hassan v Hassan</i> , 2006 ABQB 544.....	62
Note: <i>Isse v Said</i> , 2012 ONSC 1829.....	64

### (c) Opposite Sexes

Note: Same Sex Marriage and Legal Recognition of Same Sex Relationships .....	64
1. Alternative Mechanisms for Legal Recognition.....	65
2. Same sex Marriage.....	66
<i>Halpern v Canada (AG)</i> (2003), 225 DLR (4 <sup>th</sup> ) 529 (Ont C.) .....	67
Note: <i>The Same-Sex Marriage Reference</i> .....	76
Note: <i>The Civil Marriage Act</i> (2005) .....	77
Note: Conflict of Laws and Bill C-32, An Act to Amend the <i>Civil Marriage Act</i> .....	78

### (d) Capacity to Consummate

<i>Gajamugan v Gajamugan</i> (1979), 10 RFL (2d) 280 (Ont SC).....	79
<i>Norman v Norman</i> (1979), 9 RFL (2d) 235 (Ont UFC).....	81
“Judge refuses to annul unconsummated marriage” (re <i>Falk v Falk</i> ), <i>Lawyers Weekly</i> , Oct. 1, 1999 .....	81
Note: <i>L (KH) v L (G.)</i> (2003), 231 DLR (4 <sup>th</sup> ) 677 (BCCA) .....	82
Note: <i>Jomha v Jomha</i> , 2010 ABQB 135 .....	83
Note: <i>S.J. v X.J.</i> , 2020 BCSC 1336 .....	83
Geoff McMaster, “Researchers: Abolish marriage consummation as requirement for citizenship” <i>Phys.org</i> , October 28, 2019 .....	84
Questions .....	85

### (e) Monogamy

Note: Polygamy .....	86
Reference re: <i>Section 93 of the Criminal Code of Canada</i> , 2011 BCSC 1588.....	89
Susan Drummond, “A Marriage of Fear and Xenophobia: Our Criminalization of Polygamy isn’t about Protecting Women” <i>Globe and Mail</i> , April 6, 2009.....	102
Jeff Fraser, “Polyamory: Exploring the Ins and Outs of Multiple Partners” <i>Globe and Mail</i> , Sept. 21, 2012.....	103
J P Boyd, “The polyamorous family” <i>The Lawyers Daily</i> , Nov. 10, 2016.....	105
Note: <i>BDG v CMB</i> , 2016 BCPC 97 .....	107
Terry Davidson, “N.L. polyamory parenting decision puts children first, lawyers say” <i>The Lawyer’s Daily</i> , Wed June 20, 2018 .....	187
“B.C. judge rules that a woman in polyamorous family relationship be named as second mother to child”, <i>Canadian Lawyer Magazine</i> , May 4, 2021 .....	108
“Five things you need to know about polyamory”, <i>The Canadian Press</i> (June 2018).....	110

### (f) Age Requirements for a Valid Marriage

Note .....	111
------------	-----

### (g) Prohibited Degrees of Consanguinity and Affinity

Note .....	112
“Court annuls marriage between twins separated at birth” <i>The Guardian</i> , Jan. 12, 2008.....	113

### (h) Consent as a Requirement for a Valid Marriage

Note .....	114
------------	-----

#### (i) Predatory Marriages and Mental Incapacity

<i>Hunt v Worrod</i> , 2017 ONSC 7397.....	115
--	-----



(December 2018).....	119
(ii) <u>Duress</u>	
<i>S (A) v S (A)</i> (1988), 15 RFL (3d) 433 (Ont UFC) .....	121
Note: <i>Kaur v Jhamb</i> , 2019 BCSC 67 .....	124
Note: <i>M.A. v B.B.</i> , 2018 ONSC 4582 .....	124
Note: Forced Marriage and Bill S-7 .....	125
Ashley Csanady, "Barbaric Cultural Practices' bill to criminalize forced marriage, tackle 'honour killings' passes final vote" <i>National Post</i> , June 17, 2015 .....	126
(iii) <u>Limited Purpose Marriage (Immigration Marriages)</u>	
Note: <i>Singla v Singla</i> (1985), 46 RFL (2d) 235 (NSSC) .....	127
<i>Grewal v Kaur</i> , 2011 ONSC 1812 .....	129
Note: "Marriage Fraud" and Immigration.....	133
Nicholas Keung, "Immigration Guide for detecting marriage fraud called 'racist and Offensive'" <i>Toronto Star</i> , May 19, 2015 .....	133
Ron Poulton, "Marriage sponsorship refusals ignore cultural nuance" <i>Canadian Lawyer</i> October 24, 2016 .....	134
<b>C. Unmarried Cohabitation</b>	
(a) <b>Demographics</b>	
Andrew Morrison, "Who Is Family: Cohabitation, Marriage, and the Redefinition of Family", <i>Canadian Journal of Family Law</i> (2015).....	136
Anne-Marie Ambert, "Cohabitation and Marriage: How are they Related?" (Vanier Institute of the Family, Sept. 2005) .....	138
(b) <b>Legal Recognition and Regulation of Unmarried Couples</b>	
Note on Terminology .....	143
Robert Leckey, "Families in the Eyes of the Law" IRRP (July 2009) at 12 [extract on "Legal Models for Regulating Adult Relationships in Canada"] .....	144
(i) <u>Definition of Unmarried Cohabitation</u>	
<i>Molodowich v Penttinen</i> (1980), 17 RFL (2d) 376 (Ont Dist Ct) .....	145
<i>M v H</i> , [1999] 2 SCC 3 .....	149
Note: <i>Campbell v Szoke</i> (2003), 45 RFL (5 <sup>th</sup> ) 261 (Ont SCJ) .....	155
"Ontario's Divisional Court to rule on whether mistress might win spousal support", <i>Lawyers Weekly</i> , Nov. 1, 2002 .....	156
Note: <i>Stephen v Stawecki</i> (2006), 32 RFL (6 <sup>th</sup> ) 282 (Ont CA) .....	157
<i>Climans v Latner</i> , 2020 ONCA 554 .....	158
<i>A.P. v. Canada</i> (Citizenship and Immigration), 2020 FC 906 .....	164
(ii) <u>Extension of Rights and Responsibilities of Unmarried Cohabitants</u>	
Winnifred Holland, "Cohabitation and Marriage—A Meeting at the Crossroads?" (1990-1991) 7 <i>CFLQ</i> 33 .....	167
<i>Miron v Trudel</i> [1995] 2 SCR 418; .....	170
Note: The Legislative Response to <i>M v H</i> .....	173
Note: Determining Whether Unmarried Persons are "Spouses" .....	174
Nova Scotia (Attorney General) v Walsh, [2002] 2 SCR 325 .....	175
Note: Developments in the Law of Unjust Enrichment and Constructive Trusts ....	189
Note: Legislative Extension of Property Rights to Unmarried Couples .....	190
Note: Legal Recognition of Unmarried Couples in Quebec; " <i>Eric v Lola</i> " and <i>Walsh</i> revisited .....	190
Robert Leckey, "Families in the Eyes of the Law" IRRP (July 2009) at 16-18 [extract on "Form, function and the enduring focus on marriage"] .....	192
(c) <b>Legal Recognition and Regulation of Non-Conjugal Personal Relationships</b>	
"Single Judge Seeks Benefits of Couples" <i>National Post</i> , Sept. 22, 2004 .....	194
"Challenging Couple-ism" Editorial, <i>National Post</i> , Sept. 23, 2004 .....	195
Note: <i>Alberta's Adult Interdependent Relationships Act</i> (2003) .....	196
Law Commission of Canada, <i>Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships</i> (2001) at xi-xix .....	197



## III.

## DIVORCE

## A. The Social Context of Divorce

Vanier Institute of the Family, <i>Profiling Canada's Families IV</i> (2010) at 44-47, 50-51, 64-66 [extracts on divorce and remarriage] .....	201
Ann Marie Ambert, "Divorce: Facts, Figures, and Consequences" (Vanier Institute of the Family, revised 2009).....	208
Family Matters: Being Separated or Divorced in Canada.....	223
Julien D Payne, "The Dichotomy between Family Law and Family Crises on Marriage Breakdown" (1989), 20 <i>RGD</i> 109 .....	224

## B. Reform of Divorce Law

## (a) The Movement to No-Fault Divorce

H R Hahlo, "The Changing Face of Marriage and Divorce" in Rosalie Silberman Abella and Claire L'Heureux-Dubé, eds, <i>Family Law: Dimensions of Justice</i> (1983) .....	226
Note on history of divorce legislation in Canada .....	228
Dept. Of Justice, <i>Evaluation of the Divorce Act, Phase II: Monitoring and Evaluation</i> (May, 1990) at 1-9 .....	229
Note: Divorce Cases 2010/2011 .....	233
Note: Grounds for Divorce, 2008 .....	234
Note: New <i>Divorce Act</i> Amendments, 2021 .....	234

C. Obtaining a Divorce under the 1986 *Divorce Act*

## (a) Grounds for Divorce

(i) Living Separate and Apart

<i>Rushton v Rushton</i> (1968), 2 DLR (3d) 25 (BCSC) .....	237
<i>Dupere v Dupere</i> (1974), 19 RFL 270 (NBQB) .....	237
Note: Engaging in Sexual Relations after Separation .....	239
<i>Volcko v Volcko</i> , 2015 NSCA 11 .....	240
Note: <i>Calvert v Calvert</i> (1997), 32 OR 281 (Ont Gen Div).....	243
Note: Relevance of Date of Separation for Property Division .....	244
Note: Alternative to Separation as a "No-Fault" Ground for Divorce .....	244

(ii) Adultery

Mary Ann Glendon, <i>The Transformation of Family Law</i> (1989) at 286-287 .....	245
Note: Social Acceptance of Adultery .....	245
Note: Definition of Adultery .....	246
<i>P (SE) v P (DD)</i> 2005 BCSC 1290 .....	246
Notes and Questions .....	251
"Wife wants divorce for virtual adultery" Ananova, Dec. 25, 2005 .....	251
Note: Proof of Adultery ( <i>d'Entremont v d'Entremont; Burbage v Burbage</i> ) .....	252

(iii) Cruelty

Note: Test for Cruelty ( <i>Chouinard v Chouinard</i> ) .....	253
<i>Austin v. Austin</i> (1970), 2 RFL 136 (Sask CA) .....	253
<i>Gilbert v Gilbert</i> (1980), 18 RFL 240 (NS TD) .....	254
<i>B (Y) v B (J)</i> (1989), 20 RFL (3d) 154 (Alta QB) .....	257
<i>S (JG) v S (WOJ)</i> , 2004 BCSC 749 .....	259
Notes .....	261

## (b) Duties and Bars to Proceedings

(i) Condonation, Connivance, Collusion

Christine Davies, <i>Family Law in Canada</i> (1986) at 417-437 .....	262
---	-----

(ii) Inadequate Provision for Child Support

Note .....	263
------------	-----

(iii) Religious Bars

"Family Lawyers Get Change" <i>Law Times</i> , 1990 .....	264
---	-----

